(3)

No. 93-1065

Supreme Court, U.S.
FILED
FEB 16 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

BILL HARTBARGER,

Petitioner,

vs.

FRANK PAXTON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

PETITIONER'S REPLY BRIEF

JEFF ROMERO
804 Fifth Street NW
Albuquerque, New Mexico 87102
(505) 242-9000
(505) 242-4871 (facsimile)

Counsel for Petitioner,
Bill Hartbarger

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED IN THIS REPLY TO ARGUMENTS FIRST RAISED IN OPPOSITION BRIEF

Whether the Petition was timely filed; and

Whether Hartbarger is the proper party.

PETITIONER'S REPLY BRIEF

Petitioner Bill Hartbarger respectfully submits this Reply to arguments first raised in Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

ARGUMENTS AND AUTHORITIES

I.

THE PETITION WAS TIMELY FILED

The Petition for Writ of Certiorari was filed December 30, 1993, 87 days after the final order of the Supreme Court of the State of New Mexico, on October 4, 1993. In the New Mexico Supreme Court, Petitioner filed three motions for rehearing, the final motion being denied by the New Mexico Supreme Court's Order of October 4, 1993. (Appendix 48).

Such subsequent motions for rehearing are allowed under the Rules of the New Mexico Supreme Court, specifically, Rule 12-404, S.C.R.A. 1986, set forth in Plaintiff/Appellee's Brief in Support of Motion for Reconsideration and Rehearing filed August 5, 1993. (Appendix 75).

Motions for rehearing may be filed in the New Mexico Supreme Court within fifteen days of the Supreme Court's disposition or "any subsequent modification of its disposition . . . " In *Boudar v. E.G. & G., Inc.*, 106 N.M. 279, 742 P.2d 791 (1987), the New Mexico Supreme Court recognized the propriety of subsequent motions for rehearing.

In this case, the New Mexico Supreme Court modified its original June 14, 1993 Opinion (Appendix 1) on July 21, 1993 (Appendix 23). After Petitioner filed another motion for rehearing based on the court's July 21, 1993 modifications, the court again modified its decision in its opinion of September 15, 1993. (Appendix 46). As a result of the September 15, 1993 modification, Petitioner filed yet another motion for rehearing which was finally denied, without subsequent modification, on October 4, 1993. (Appendix 48). Thus under Rule 13.4 of the Rules of the Supreme Court, this Petition has been timely filed.

II.

BILL HARTBARGER IS THE PROPER PARTY

Petitioner filed a Petition in Bankruptcy on October 5, 1993. The time for filing a Petition for Writ of Certiorari expired on or about January 3, 1994. On December 30, 1993, the date the Petition for Writ of Certiorari was filed in this case, Petitioner's claim for wrongful discharge (although having been duly listed as property of the estate), had not yet been abandoned by the Trustee from the Bankruptcy Court estate.

Since that time, the Trustee has authorized Jeff Romero, counsel for Petitioner, to proceed as the Trustee's attorney in this cause. (Appendix 93, attached hereto). Thus Petitioner is fully authorized to proceed in this cause.

Additionally, Petitioner was discharged in Bankruptcy on January 31, 1994. (Appendix 97 attached

hereto). As a result, Petitioner's cause of action as an asset of the estate has been abandoned by the Trustee.

CONCLUSION

The Petition in this case was timely filed and Bill Hartbarger is presently authorized to proceed with this Petition. Petitioner prays the Court to grant the Petition for Writ of Certiorari.

This 15th day of February, 1994.

Respectfully submitted,

Attorney at Law
JEFF ROMERO

Attorney for Petitioner

Attorney at Law
JEFF ROMERO
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

Billy Gene Hartbarger,
SSN 521-46-1434
Geraldine M. Hartbarger,
SSN 525-78-6849,

No. 7-93-12970-MA

Debtors.

ORDER APPROVING EMPLOYMENT OF SPECIAL COUNSEL FOR TRUSTEE AND DEBTORS TO PURSUE NON-BANKRUPTCY LITIGATION

(Filed Feb. 11, 1994)

Upon the unopposed Motion of the Trustee, joined in by Debtors, for the Employment of Special Counsel, Jeff Romero, to pursue any appeal or other rights the Debtor and/or Trustee have in the case, captioned, *Bill Hartbarger vs. Frank Paxton Company and Alan Crownover,* which was assigned Case No. CV-89-05189 in the Second Judicial District Court, including any and all appeals, petitions or further proceedings in said case, and the Court being fully advised enters the following:

The Court Finds: that Bill Hartbarger filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code in this case on October 5, 1993, and Debtors' claim for wrongful discharge and other damages in the case styled *Bill Hartbarger vs. Frank Paxton Company, et al.* was duly listed as property of the estate, and Debtors having claimed an exemption in the Paxton Suit to the extent of One Thousand Six Hundred Thirty-Four Dollars and Fifty-One Cents ($1,634.51), and it further appearing that

the time for filing a petition for writ of certiorari expired on or about January 3, 1994, and the claim had not yet been abandoned, by the Trustee, from the Bankruptcy Court estate, and Hartbarger, and his counsel, were of the opinion that good grounds existed for filing a petition with the Supreme Court of the United States filed the petition on or about December 30, 1993.

The Court Concludes: that Jeff Romero does not represent or hold any interest adverse the Debtor, or the estate, in the matter upon which this person is to be engaged as special counsel for the Trustee, special counsel is disinterested and employment would be in the best interest of the estate and creditors and no adverse interest being represented and the Trustee and Special Counsel, Jeff Romero, having complied with Section 327 of the Bankruptcy Code enters the following:

IT IS HEREBY ORDERED that the Trustee, be and the same hereby is authorized to employ Jeff Romero as Trustee's attorney in all matters requiring services of an attorney concerning the *Hartbarger vs. Frank Paxton Company, et al.*, including but not limited to filing all necessary pleadings, taking all appeals and filing a petition for writ of certiorari in the Supreme Court of the United States and taking any and all other action on behalf of the Trustee and Debtors as their interests may appear to preserve this claim in the referenced case; the Trustee and the bankruptcy estate ratify, adopt and approve all actions taken by Special Counsel, Jeff Romero, to date in the *Paxton* case including, but not limited to filing the petition for writ of certiorari with the Supreme Court of the United States. Jeff Romero is also employed as counsel Debtors to represent their interest in this case as their

interests may appear and/or may be adjudicated by the Court.

IT IS FURTHER ORDERED, that the actions and pleadings already taken in the *Paxton* case on behalf of the named party, Bill Hartbarger, only shall be deemed to have been taken on behalf of and in the name of Bill Sholer, Trustee, in Bankruptcy Case No. 7-93-12970 MA and Bill Hartbarger and that Bill Sholer as Trustee is a party in interest in the Petition filed in the name of Bill Hartbarger for all purposes.

IT IS FURTHER ORDERED, that compensation and to be paid to Jeff Romero has not been resolved by this Order and that the parties reserve the right to file such further proceedings as are necessary to resolve the issue of compensation for Jeff Romero and repayment for expenses. Jeff Romero is employed as Special Counsel on the condition that no application for fees or expenses may be made against the estate or the Trustee since this is a no-asset estate at this time and all fees or compensation would be from the *Paxton* suit in the event the appeal or further proceedings are successful in any recovery. The Trustee shall not be liable for any fees, costs or expenses incurred in the proceedings or actions taken by Special Counsel, Jeff Romero.

IT IS FURTHER ORDERED that this Order is subject to the Trustee abandoning the *Paxton* suit at a later date.

STEWART ROSE
Mark A. McFeeley
United States Bankruptcy Judge

Approved by:

Telephonically approved 2/11/94
Bill Sholer, Trustee
5353 Wyoming Blvd. NE, Suite 1
Albuquerque, NM 87109
(505) 821-3343

/s/ Jeff Romero
Jeff Romero, Special Counsel
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

Telephonically approved 2/11/94
Louis Puccini, Jr.
Attorney for Debtors
P.O. Box 30707
Albuquerque, NM 87190-0707
(505) 255-0202

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO
500 Gold Avenue SW, 9th Floor – P.O. Box 546
Albuquerque, New Mexico 87103

Bill J. Sholer, Trustee
5353 Wyoming NE, #1
Albuquerque, NM 87109

Case Number: 7 93-12970 M

NAME OF DEBTOR(S):

Billy Gene Hartbarger, 521-46-1434
Geraldine M. Hartbarger,
525-78-6849

DISCHARGE OF DEBTOR(S) AND FINAL DECREE CLOSING CASE

It appearing that a petition commencing a case under title 11, United States Code, was filed by or against the above-named debtor(s) on 10/05/93, and that an order for relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor(s) was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor(s) was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor(s) was filed, but was not sustained by the Court];

IT IS ORDERED that

1. The debtor(s) is (are) released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor(s) with respect to any of the following:

(a) debts dischargeable under 11 U.S.C. Sec. 523;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. Sec. 523(a);

(c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the debtor(s).

IT IS FURTHER ORDERED that

This estate having been fully administered, BILL J. SHOLER is discharged as trustee of this estate, the bond is cancelled, and the chapter 7 case of the above-named debtor(s) is closed.

This notice was mailed within 5 business days of the date shown below to all names on the mailing list attached to the original of this notice on file in the Office of the Clerk.

Discharge Dated: 1/31/94 BY THE COURT

Mark B. McFeeley
United States
Bankruptcy Judge